

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DONALD KEITH ELLISON,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 19-mc-80167-JST

**ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING ORDER**

Re: ECF No. 10

Before the Court is Plaintiff Donald Keith Ellison's motion for a temporary restraining order ("TRO"). ECF No. 10. The Court will deny the motion.

I. BACKGROUND

Donald Keith Ellison served as president of Cobra Energy LLC from January 2017 until June 2019. ECF No. 1-4 ¶ 1. In October 2017, Cobra Acquisitions LLC, an affiliate of Cobra Energy, was awarded a \$200,000,000 contract by Puerto Rico Electric Power Authority ("PREPA") to perform repairs to the Puerto Rico electrical system following damage by Hurricanes Irma and Maria. *Id.* ¶ 5; ECF No. 26-1 ¶ 6. That contract was twice amended in early 2018, and PREPA awarded a new contract to Cobra Acquisitions in May 2018. ECF No. 26-1 ¶ 9. In all, PREPA contracted with Cobra Acquisitions for a total of \$1,845,429,800. *Id.* These contracts were awarded as part of the Public Assistance ("PA") grant program operated by the Federal Emergency Management Administration ("FEMA"). *Id.* ¶ 5.

The government is conducting an "ongoing criminal investigation involving FEMA's PA grant program, PREPA, and contracts awarded to COBRA." *Id.* ¶ 10. On April 26, 2019, the Federal Bureau of Investigation ("FBI") obtained warrants from the United States District Court for the District of Puerto Rico to seize funds in several bank accounts belonging to Ellison, as well

as a catamaran and a pickup truck, as being subject to forfeiture. *Id.* ¶ 12. One of these warrants authorized seizure of up to \$1,000,000 in funds from a Charles Schwab account in Ellison’s name (“Schwab Warrant”). ECF No. 10-2 at 6. The affidavit underlying the Schwab Warrant is sealed. ECF No. 26-1 ¶ 3. The declaration submitted by the government does not explain the basis for the government’s belief that these assets are subject to forfeiture, but the government’s opposition brief indicates that the property is “subject to forfeiture as property constituting or traceable to proceeds of violations of federal criminal statutes,” including 18 U.S.C. § 1031 (major fraud against the United States); 18 U.S.C. § 371 (conspiracy); and 18 U.S.C. § 201 (bribery of public officials). ECF No. 26 at 3. To date, the government has initiated neither criminal proceedings nor forfeiture proceedings against Ellison.

On June 12, 2019, Ellison filed a motion under Federal Rule of Criminal Procedure 41(g) seeking “the return of all securities seized from the Schwab Account and all funds seized from the Schwab Account in excess of the \$1 million in funds expressly authorized by the Schwab Warrant.” ECF No. 1 at 17. He “also seeks the production of any affidavits and other supporting documentation that the Government submitted as part of its application for the Schwab Warrant.” *Id.* at 27. As far as the Court is aware, Ellison has not filed any similar motions regarding other seized assets.

On June 14, 2019, Ellison filed a motion for a TRO seeking the following:

(1) immediate relief to prevent the Government and all persons or entities acting on its behalf from removing, transferring, selling, liquidating, or otherwise disposing of any securities or funds that the Government unlawfully seized in this District, (2) immediate relief to release all securities, and funds over the amount of \$1,000,000.00 seized in violation of the relevant seizure warrant, (3) immediate relief permitting Plaintiff to manage the account and access it to pay his financial obligations including living expenses, child support, legal expenses, and other financial obligations necessary to preserve his other assets, such as real and personal property and indebtedness, and (4) the unsealing of affidavits and other supporting documents in support of the Government’s seizure warrant.

ECF No. 10 at 32.

On June 18, 2019, the government obtained additional warrants, also from the United States District Court for the District of Puerto Rico, to seize an additional \$3,425,512.93 from the

1 same Schwab account, as well as a tractor and an excavator. ECF No. 26-1 ¶ 4; ECF No. 29-1 at
2 6, 8. The affidavit underlying this second Schwab warrant is also sealed. ECF No. 26-1 ¶ 4.

3 On June 21, 2019, the government opposed Ellison’s TRO motion, ECF No. 26, and filed a
4 motion to transfer venue to the District of Puerto Rico, ECF No. 27. In its opposition, the
5 government stated that it “does not intend to liquidate or take any action with respect to the assets
6 seized in Plaintiff’s Charles Schwab account prior to initiating a civil forfeiture complaint or
7 administrative forfeiture process where Plaintiff will have the opportunity to challenge the lawful
8 seizure of this account prior to any liquidation of his account.” ECF No. 26 at 5.

9 Ellison filed his reply on June 28, 2019. He now argues that “either the Court should
10 return all Mr. Ellison’s property to him . . . or Mr. Ellison should be permitted to withdraw
11 \$50,000 per month [which Ellison contends was his last monthly base salary from Cobra] from his
12 Schwab account, or Mr. Ellison should be allowed to withdraw sufficient funds to pay expenses
13 totaling \$28,834.67 per month as detailed in the schedule Ellison attached to his affidavit.” ECF
14 No. 29 at 18. Ellison also continues to seek unsealing of the affidavit underlying the Schwab
15 Warrant.

16 **II. LEGAL STANDARD**

17 The Court applies a familiar four-factor test on both a motion for a temporary restraining
18 order and a motion for a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush &*
19 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking either remedy “must establish that
20 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
21 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
22 public interest.” *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.
23 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Injunctive relief is
24 “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
25 entitled to such relief.” *Winter*, 555 U.S. at 22.

26 To grant preliminary injunctive relief, a court must find that “a certain threshold showing
27 [has been] made on each factor.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per
28 curiam). Assuming that this threshold has been met, “serious questions going to the merits and a

balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted).

III. DISCUSSION

The government first argues that Ellison’s TRO motion should be denied because the case should be transferred to the District of Puerto Rico under 28 U.S.C. § 1404(a), which provides that, “[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The transfer of the case is the subject of a separate motion that is not yet before the Court. ECF No. 27. The government does not argue that venue is improper in this district, and it did not move for expedited consideration of its transfer motion. The Court will consider the merits of the government’s venue arguments when that motion becomes ripe. It does not consider such arguments now or find they present good cause for denying Ellison’s TRO motion.

The Court next considers Ellison’s request to unseal the affidavits underlying the warrants at issue in this case.¹ The parties raise various arguments regarding whether the affidavits should be maintained under seal, but neither party addresses the more fundamental question of whether this Court even has the authority to order the unsealing of affidavits that were sealed by another court. Based on its review of the cases relied on by the parties, the Court concludes that it lacks this authority. As one judge concluded in a case relied on by Ellison:

Rather than filing an application to unseal the affidavits submitted in support of the search warrants executed at Dolarian’s various banking institutions on the dockets of those search warrants, Dolarian seeks to conflate the various cases in which he is involved and is asking the undersigned – who is presiding over the civil action proceeding against Dolarian and his corporation DCI – to order the affidavits unsealed. Dolarian has not offered any authority compelling the Court to take such action and the undersigned declines to do so.

Societe d’Equipments Internationaux Nigeria, Ltd. v. Dolarian Capital, Inc., No. 1:15-cv-01553-

¹ Although Ellison’s briefs refer to a single “Schwab Warrant,” he presumably also seeks unsealing of the affidavit underlying the second Schwab warrant.

DAD-SKO, 2016 WL 4191887, at *2 (E.D. Cal. Aug. 8, 2016). The parties' remaining cases are not helpful, because they involve either a magistrate judge reviewing his or her own sealing decision or a district judge reviewing a sealing decision by a magistrate judge in the same district. *See In re Seizure of Certificate of Deposit #8400367396-1 Located at Midfirst Bank (MFB) v. Craig*, No. CIV-11-162-M, 2011 WL 744296 (W.D. Okla. Feb. 24, 2011) (district judge reviewing sealing decision by magistrate judge in same district); *In re Searches & Seizures*, No. 08-SW-0361 DAD, 2008 WL 5411772 (E.D. Cal. Dec. 19, 2008) (magistrate judge reviewing own sealing decision); *In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp. 2d 584 (D. Md. 2004) (district judge reviewing sealing decision by magistrate judge in same district); *In the Matter of Search of Up N. Plastics, Inc.*, 940 F. Supp. 229 (D. Minn. 1996) (magistrate judge reviewing own sealing decision); *In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 297 (S.D. Ohio 1995) (district judge reviewing sealing decision by magistrate judge in same district); *In the Matter of Searches of Semtex Indus. Corp.*, 876 F. Supp. 426 (E.D.N.Y. 1995) (district judge reviewing sealing decision by magistrate judge in same district). In the absence of any contrary authority, the Court concludes that Ellison must seek unsealing of the affidavits in the District of Puerto Rico. Ellison is therefore unlikely to succeed on the merits of that request in this district and has failed to raise even serious questions that he is entitled to such relief from this Court.

Ellison argues that he cannot seek relief in Puerto Rico because his motion is one for the return of assets pursuant to Federal Rule of Criminal Procedure 41(g), which provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized." Fed. R. Crim. P. 41(g) (emphasis added).² Although such motions are "styled as a motion under a Federal Rule of Criminal Procedure, when the motion is made by a party against whom no criminal charges have been brought, such a motion is in fact a petition that the district

² At the motion hearing, the government noted that a motion for return of property seized pursuant to 18 U.S.C. § 981 can be filed "in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized." 18 U.S.C. § 981(b)(3) (emphasis added). The government also represented, without citation to the factual record, that the applications in this case were made under section 981. Because there is no record of the applications, the Court does not pursue the point further.

1 court invoke its civil equitable jurisdiction.” *United States v. Comprehensive Drug Testing, Inc.*,
 2 621 F.3d 1162, 1172 (9th Cir. 2010) (en banc), *abrogated on other grounds by Hamer v.*
 3 *Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 21 (2017). “The district court is required
 4 to balance four discretionary factors to determine whether to allow the government to retain the
 5 property, order it returned or . . . craft a compromise solution that seeks to accommodate the
 6 interests of all parties.” *Id.* at 1173. The four discretionary factors are: “(1) whether the
 7 Government displayed a callous disregard for the constitutional rights of the movant; 2) whether
 8 the movant has an individual interest in and need for the property he wants returned; 3) whether
 9 the movant would be irreparably injured by denying return of the property; and 4) whether the
 10 movant has an adequate remedy at law for the redress of his grievance.” *Ramsden v. United*
 11 *States*, 2 F.3d 322, 325 (9th Cir. 1993).³

12 Considering the first factor, Ellison has not demonstrated that the government has
 13 displayed a callous disregard for his constitutional rights. Although the initial Schwab Warrant
 14 limited the funds subject to seizure to \$1,000,000, the government obtained a subsequent warrant
 15 authorizing seizure of the remaining funds. Ellison therefore can no longer argue that he is
 16 entitled to the return of funds in excess of \$1,000,000 on grounds that no warrant authorized
 17 seizure of those funds.⁴ Ellison posits that the underlying affidavits were insufficient to establish
 18 probable cause for the seizure of funds in his Schwab account, but because the affidavits are
 19 sealed, Ellison cannot point to any false statements in the affidavits. *Cf. Franks v. Delaware*, 438,
 20 U.S. 154, 171 (1978) (affording presumption of validity to affidavits supporting a search warrant);
 21 *United States v. Fisher*, 137 F.3d 1158, 1164 (9th Cir. 1998) (to be entitled to evidentiary hearing,
 22 party must “make a substantial preliminary showing (1) that the affidavit contained false
 23 statements made knowingly or with reckless disregard for their falsity, and (2) that without the
 24

25 ³ Ellison cites these factors only in a footnote in his opening brief, ECF No. 10 at 16 n.4, and the
 26 government does not mention them at all. The Court nonetheless applies the factors so it can
 adequately consider Ellison’s likelihood of success on the merits.

27 ⁴ Ellison’s motion does not present, and the Court does not reach, the question of whether Ellison
 28 is entitled to any relief based on the government’s initial seizure of all assets in the Schwab
 account when the first warrant, on its face, authorized seizure of only up to \$1,000,000.

false statements the affidavit would not establish probable cause”). Indeed, at the hearing on this motion, Ellison’s counsel appropriately conceded that the search warrant affidavits might recite facts that would make seizure of the Schwab account assets appropriate, notwithstanding Ellison’s belief that no such facts exist. The Court appreciates that Ellison seeks to review the affidavits so that he can attempt to show that they do not contain such facts, but, as discussed above, he must seek unsealing of the affidavits in the District of Puerto Rico.

Ellison also appears to contend that his due process rights have been violated because the government has not yet initiated criminal or forfeiture proceedings, but he cites no authority for the proposition that the approximately two-month period between the seizure of funds in his Schwab account and the filing of this motion constitutes undue delay. *Cf. Omid v. United States*, 851 F.3d 859, 862 (noting that “[o]wners of personal property worth more than \$500,000” may file a Rule 41(g) motion “when the government seizes their property and delays initiating judicial forfeiture proceedings *for months or years on end*” (emphasis added)).⁵ Without more, the Court cannot conclude that Ellison has raised serious questions that the government has displayed a callous disregard for his constitutional rights.

In addition, Ellison has not demonstrated that he lacks adequate remedies at law. To the contrary, the government has stated that it “does not intend to liquidate or take any action with respect to the assets seized in Plaintiff’s Charles Schwab account prior to initiating a civil forfeiture complaint or administrative forfeiture process where Plaintiff will have the opportunity to challenge the lawful seizure of this account prior to any liquidation of the account.” ECF No. 26 at 5. Although Ellison notes that the government has not yet initiated any forfeiture proceedings, he does not disagree that these processes will be available to him if and when the government does so.

Finally, the Court considers whether Ellison has demonstrated that he would be irreparably injured if his property were not returned. Ellison makes no showing at all that he will be injured if

⁵ Ellison quotes this passage from *Omid* but omits the phrase, “for months or years on end.” ECF No. 10 at 28.

he does not receive the immediate return of the entirety of funds seized from his Schwab account. Nor does he provide any basis for finding irreparable injury if he is denied access to his requested \$50,000 per month. At best, Ellison can claim some injury from being unable to pay what he contends are \$28,834.67 in monthly expenses.⁶ ECF No. 29-1 at 4, 10. But it is difficult for the Court to quantify the actual injury – or accept Ellison’s declaration as an accurate depiction of his true monthly expenses – given his use of high numbers and his inclusion of items that the Court has difficulty categorizing as necessities. Annualizing the expenses in his declaration, for example, Ellison lists expenses of \$30,000 for travel, \$60,000 for “emergency savings,” \$12,000 for clothing, \$14,400 for entertainment, and \$18,000 for “miscellaneous expenses.” To this Court, \$134,000 in annual discretionary expenses does not sound like an emergency, especially when those expenses make up more than half of Ellison’s claimed total. Not only is it difficult to accept these figures as accurate reflections of their individual categories; they also undermine the credibility of the declaration as a whole. Ellison’s declarations also fail to establish that he has no other means to obtain income or pay his expenses, and he cites no authority to support a finding that reliance on “credit cards, [his] final paychecks and the help of [his] spouse” constitutes irreparable injury. This both undermines his likelihood of success on the merits of his Rule 41(g) motion for return of property and fails to establish the likelihood of irreparable injury required to support issuance of preliminary injunctive relief. *All. for the Wild Rockies*, 632 F.3d at 1135.

Based on all of the above, the Court concludes that Ellison has failed to make the “clear showing” required to support his request for a TRO. *Winter*, 555 U.S. at 22.

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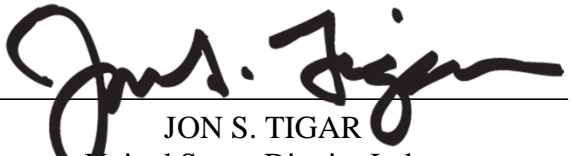
⁶ These expenses do not include legal fees because “[a]t present, [Ellison] has been assured that he will be indemnified whether by his former employer or through a Director’s and Officers Insurance policy for his legal expenses.” ECF No. 29 at 9.

CONCLUSION

Ellison's motion for a temporary restraining order is denied.

IT IS SO ORDERED.

Dated: July 10, 2019



JON S. TIGAR
United States District Judge

United States District Court
Northern District of California